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Chairman Mike Gleason
Commissioner William A. Mundell
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Commissioner Gary Pierce
Parties to the Docket

Re: Dissent to Decision No. 69399, Empirita Water Company CC&N Extension; Docket No. W-03948A-06-0490

Dear Colleagues and Parties to the Docket:

Today, I respectfully file this dissent on Decision No. 69399. In my view, the Commission's decision to grant Empirita Water Company's ("Empirita") request for an extension of its Certificate for Convenience and Necessity ("CC&N") falls well short of sound public policy as it has the potential to dramatically impact up to 75 private wells in the surrounding area, was made in the face of a state hydrologist's memorandum questioning the findings of the Company hydrologist, lacks adequate water conservation requirements and could have a deleterious effect on the Cienega Creek Basin.¹

While the Arizona Department of Water Resources ("ADWR") ultimately determined that the Company has proven up adequate physical availability of water supplies for its proposed build-out, totaling 321 ac-ft/yr,² a hydrologist for DWR who reviewed the Company's hydrological study also determined that the proposed new development and associated water company expansion would "probably capture a majority of the groundwater flux in the area" and dramatically impact a number of nearby wells. Specifically in this regard, a DWR Memorandum introduced into the record in this case states the following:

Impacts to the domestic wells (upwards of 75 wells) found in the vicinity (about one mile) of the well field for the Empirita water Company will likely experience large

¹ I take judicial notice that the Cienega Creek Basin has been described as a biologically diverse watershed that acts as a source of groundwater recharge for the City of Tucson. Portions of the Basin lie in both Cochise and Pima Counties. See DWR Fact Sheet on Cienega Creek Basin, at http://www.water.az.gov/dwr/Content/Find_by_Program/Rural_Programs/OutsideAMAs_PDFs_for_web/Southeastern_Arizona_Planning_Area/Cienega_Creek_Basin.pdf; see also Sonoran Institute Fact Sheet on the Cienega Creek Watershed at www.sonoran.org/index.php?option=com_content&task=view&id=62&Itemid=158.

² See DWR letter to Larry Robertson, attorney for Empirita Water Company, dated March 27, 2007, a Physical Availability Determination for the Company of 321 acre-feet per year for 100 years. The PAD determination letter was presented to the Commissioners at the Commission's Open Meeting prior to the vote on this matter.

impacts due to declines in the groundwater table. Many domestic wells will probably need to be deepened, or will go dry.³

The DWR memorandum also appears to question whether groundwater levels in the area of the Empirita Water Company's proposed expansion will remain steady, noting that "the flux appears to be driven by flow from the Cienega Creek area. It is unclear if this flow could be maintained as the groundwater levels decline over time. Where the flow enters the zone of the production wells, there appears to be a bounding fault, such that the groundwater must maintain an elevation that exceeds the upthrown elevation of this faulted strata where the production wells are found."⁴

There also appears to be a disagreement between the DWR and Company hydrologists over the very nature of the aquifer, with the Company's hydrologist taking the position that the aquifer is a "basin fill type aquifer system"⁵ and the DWR hydrologist concluding that the aquifer could be a confined or fractured system.⁶

Perhaps most disturbing is the DWR hydrologist's prediction that the Company's proposed new wells will "intercept" water coursing northward toward approximately 75 private wells, leaving them susceptible to being dewatered.⁷

Intervenor McCool, the owner of one of the wells DWR predicts will be negatively impacted by the Company, requested in her testimony before the Administrative Law Judge that the Commission adopt measures designed to mitigate the predicted drawdown of water on the aquifer. Specifically, she asked that the Commission attempt to require that all developers adopt deed restrictions to prevent individual wells from being drilled and impose CC&R's restricting swimming pools and water features; require Empirita to extend its CC&N to include the affected well-owners; and mandate that the Company monitor the wells of its neighbors if requested.⁸

In response to this evidence I offered three amendments designed to promote water conservation and assist neighboring well owners should their wells be dewatered by the Company's operations. Only one of those three amendments was approved.

Mayes #4 would have ordered Empirita to monitor water levels in the surrounding area, and if large impacts on these private wells were detected, would have required the Company to make a filing to incorporate these affected well-owners within its certificated area. I believe the Commission has the authority to order a public service corporation to monitor surrounding wells for the impact that a CC&N extension has on those wells, as a necessary step toward the eventual

³ See attached ADWR Memorandum, August 28, 2006, Page 11. The Memorandum was introduced by Intervenor Mary McCool.

⁴ Id at Page 7.

⁵ See Exhibit A-19 at page 3.

⁶ Id at Page 5.

⁷ See DWR Memorandum, at page 6-8, 10.

⁸ See Transcript of the hearing at 169 and Recommended Opinion and Order at page 6.

inclusion of those customers in the CC&N. I withdrew Mayes #4 from consideration when it became clear that it did not have the support of a majority of Commissioners.

As concerning as the negative impact on surrounding private wells is the effect this decision could have on the Cienega Creek Basin and, as a result, on the Company's own customers. Those customers live within five miles of the Cienega Creek⁹ and will soon rely on the basin's aquifer. Indeed, the Order spoke to the need for conservation measures in this case: "...[the Commission] does have authority over the water public service corporation and *can order the water company to implement water conservation measures that are in the public interest.*"¹⁰ The Commission could have ordered Empirita to implement conservation measures for its customers, but chose not to.

Mayes Proposed Amendment #2 would have required Empirita to file a conservation tariff within 150 days. This proposed conservation tariff was predicated upon the Best Management Practices ("BMPs") that DWR is promulgating in its conservation rulemaking.¹¹ Had it passed, Mayes #2 would have required Empirita to file a conservation tariff that would have included, but was not limited to, low water use landscaping requirements, limitations on water intensive landscaping and turf, requirements for car wash water recycling and landscape watering restrictions. The amendment would have also required Empirita to condition the provision of new service upon the implementation of low-flush toilets and low-pressure showerheads by customers. This amendment failed.

Mayes Proposed Amendment #3 requires the Company to file with the Commission within 150 days a new rate application in order to implement tiered rates that more effectively encourage conservation by the Company's customers. The Company's current rates have only two tiers, with the first tier set at 10,000 gallons, a high initial break-over point that is unlikely to spur much conservation. The amendment, which passed, mandates that the Company file a three tiered rate with the first tier less than 10,000 gallons.

Several Commissioners expressed the view that the Commission was barred from adopting the Mayes Amendments because they fell outside the Commission's jurisdiction. I simply disagree with this assessment. The Commission has the power to act in the broad public interest, and has specific Constitutional authority to take actions to protect the health and safety of the patrons and employees of public service corporations¹² and statutory authority to act where it determines that the provision of service by a public service corporation is "unjust, unreasonable, unsafe,

⁹ A Company representative stated during the Open Meeting on this matter that the proposed extension are is within five miles of Cienega Creek.

¹⁰ Decision No. 69399 at 6, line 26.

¹¹ See Draft Program Framework: Modified Non-Per Capita Conservation Program, Oct. 5, 2006, Arizona Department of Water Resources.

¹² See Article 15, Section 3 of the Arizona Constitution.

improper, inadequate or insufficient".¹³ We have relied on this authority before, most recently when we began prohibiting the sale of groundwater for use on golf courses and ornamental water features.¹⁴

The record in this case indicates that at build-out Empirita will serve 972 connections, 881 of which will come from the new service area. While the passage of Mayes Amendment #3 may ameliorate some of the impact on the aquifer associated with this growth, the absence of strict conservation measures or monitoring requirements leaves both nearby well-owners and the customers of the Company without necessary insurance against future water shortages. The Commission has a panoply of safeguards available to it to address situations like this one, where water supplies and impacts on an aquifer are clearly at issue. Unfortunately, we failed to adopt those safeguards in this case.

It is for the abovementioned reasons that I respectfully file this dissent.

Sincerely,



Kris Mayes
Commissioner

¹³ See ARS § 40-321 (A), which provides, "When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation."

¹⁴ Most new CC&N's and CC&N extensions now carry this prohibition.